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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, *et al.*,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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INTRODUCTION

The government appeals from a preliminary injunction barring the enforcement of the Communications Decency Act of 1996 (CDA),[1] which imposes criminal penalties on constitutionally protected speech occurring on the Internet. The Internet has no parallel in the history of human communication. It provides millions of people around the globe with a low-cost method of conversing, publishing, and exchanging information on a vast array of subjects with a worldwide and virtually limitless audience. It also provides a foundation for new forms of community -- communities based not on any accident of geographic proximity, but on bonds of common interest, belief, culture or temperament.

As Congress itself recognized, "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[2] The CDA jeopardizes each of these goals. Unless enjoined, it will reduce this "never-ending, worldwide conversation" to a level deemed suitable for children. Appendix to the Jurisdictional Statement 146a (J.S. App.).

Specifically, the CDA makes it a crime, punishable by up to two years in prison, for anyone to use online computer communications to transmit or "display in a manner available to minors" any material that is "indecent" or "patently offensive." Because there is no way for the vast majority of Internet speakers to distinguish between adults and minors in

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[1] The challenged provisions of the CDA were enacted as Title V of the Telecommunications Act of 1996, Pub.L.No. 104-104, §502, 110 Stat. 56, 133-35. The CDA will be codified at 47 U.S.C. §§223(a) to (h), and it is those citations that plaintiffs will use throughout this brief.

[2] §230(a)(3).

their audience, the CDA is the most restrictive censorship scheme imposed on any medium. For that reason, among many others, the government has yet to convince even a single federal judge that the statute, as written, can be sustained.

STATEMENT OF THE CASE

This appeal arises from two consolidated cases challenging the constitutionality of the CDA. A three-judge district court heard five days of testimony on plaintiffs' motions for a preliminary injunction, including an online demonstration of all of the methods of communicating on the Internet.[3] The court also considered numerous affidavits and extensive documentary evidence submitted by both sides. The decision to grant a preliminary injunction was unanimous. All three judges agreed that the statute violated the First Amendment. Two members of the panel also concluded that the critical provisions of the CDA were unconstitutionally vague.[4]

The preliminary injunction decision in this case is supported by 409 separate factual findings. The overwhelming majority of the findings (334) were derived from a joint stipulation submitted by the parties.[5] Those findings, which

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[3] The three-judge court was convened pursuant to a special judicial review provision. Title V, Subtitle B, Pub.L.No. 104-104, §561(a), 110 Stat. 142.

[4] A separate challenge to §223(d), filed in the Southern District of New York, also resulted in a preliminary injunction from a three-judge court on July 29, 1996. *Shea v. Reno*, 930 F.Supp. 916 (S.D.N.Y. 1996). The government's appeal in *Shea* is pending before this Court.

[5] The district court's findings appear in the record in two separate places. A total of 123 findings are set forth in the district court opinion (continued...)

are not disputed by the government, comprehensively describe the plaintiffs, their speech, the nature of the Internet as a communications medium, the inadequacy of the statutory defenses relied on so heavily by the government, the ineffectiveness of the CDA in accomplishing its asserted goals, and the availability of less restrictive alternatives that enable parents (rather than the government) to decide what material their children should see.

A. The Statutory Framework

The criminal provisions challenged in this action are embodied in two sections of the CDA. Section 223(a)(1)(B) applies to "telecommunications device[s]." J.S. App. 6a-7a n.5. Under §223(a)(1)(B), it is a felony to transmit an "indecent" communication "knowing that the recipient of the communication is under 18 years of age." The term "indecent" is undefined in the statute.[6]

Section 223(d)(1) applies to "interactive computer services." It criminalizes communications to minors that, "in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[7] Section 223(d)(1)(A)

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[5] (...continued)
itself. J.S. App. 12a-61a, ¶¶1-123. The stipulated description of the plaintiffs and their speech was incorporated by reference in the district court opinion but not set out in full. *Id.* at 12a n.9. Those paragraphs appear as an appendix to the Motion to Affirm in *Reno v. ACLU*, and are cited hereafter with the prefix "M.A."

[6] Section 223(a)(1)(B) also prohibits the transmission of "obscene" communications on the Internet. This case does not challenge the application of existing obscenity, child pornography, or solicitation laws to the Internet.

[7] The government argues that "indecency" and "patent offensiveness" (continued...)

makes it a crime to "use[] an interactive computer service to send [such material] to a specific person or persons under 18 years of age."[8] Section 223(d)(1)(B) makes it a crime to "display [such material] in a manner available" to any person under eighteen.[9]

Until reaching this Court, the government made very little effort to distinguish among these provisions or to defend their constitutionality, standing alone. Rather, throughout the district court proceedings, the government's case primarily relied on the defenses set forth in §223(e)(5). Section 223(e)(5)(A) creates an affirmative defense for anyone who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to [prohibited] communication[s] . . . ." Section 223(e)(5)(B) creates an affirmative defense for anyone who "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

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[7] (...continued)
have the same meaning. Brief for Appellants (Gov't Brief) at 10. While the statute itself provides no support for the government's position, *see* J.S. App. 64a-65a (Sloviter, J.), *id.* at 91-93a (Buckwalter, J.), plaintiffs will use the term "indecency" in this brief to refer to both §223(a) and §223(d).

[8] On appeal, the government asserts that §223(a)(1)(B) and §223(d)(1)(A) apply to the same types of communication and differ only in the type of technology that they cover. *See* Gov't Brief at 24-25 & n.6.

[9] Plaintiffs also challenged and the district court struck down §§223(a)(2) and (d)(2), which make it a crime to "knowingly permit" use of a telecommunications facility for expression prohibited by §§223(a)(1)(B) or 223(d)(1).

B. The Reach Of The CDA: Plaintiffs And Their Speech

The plaintiffs in these consolidated cases illustrate the spectrum of individuals and organizations who use online computer networks to communicate, send, display and access information, including information that could be considered "indecent" or "patently offensive."[10] Plaintiffs include nonprofit public interest organizations, such as the American Civil Liberties Union (ACLU), American Library Association (ALA), Planned Parenthood Federation of America (PPFA), Human Rights Watch (HRW), Electronic Privacy Information Center (EPIC), and Electronic Frontier Foundation (EFF), as well as for-profit corporations such as Wildcat Press, BiblioBytes, and Prodigy.

Individual plaintiffs include Kiyoshi Kuromiya, who runs the Critical Path AIDS site on the World Wide Web, and Declan McCullagh, who alone operates the Justice On Campus Web site and a popular online discussion list on censorship issues. M.A. 23a-26a, ¶¶176-188; *id.* at 27a-28a, ¶¶194-97. Corporate speakers and trade groups include Microsoft, the American Booksellers Association, and the National Writers Union. Some plaintiffs provide material that is accessed by large numbers of people each day, M.A. 1a-5a, ¶¶70-84; *id.* at 23a-26a, ¶¶176-88, while others simply send an occasional e-mail to relatives or friends, *id.* at 14a, ¶131. Some plaintiffs also provide access to the Internet in addition to being speakers and users of online information. *See id.* at 16a-17a, ¶¶140-44; 23a-26a, ¶¶176-88.

The plaintiffs do not speak with a single voice or on a single issue. However, all plaintiffs engage in speech that may be regarded as "indecent" by some communities across

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[10] For a more thorough description of the plaintiffs, *see* M.A. 1a-63a, ¶¶70-356.

this country, notwithstanding its social value.[11] As set forth in the record, that speech includes the following:

Speech about AIDS, safer sex practices, and prisoner rape: Plaintiffs include several individuals and organizations who engage in frank speech about sexual practices. Critical Path is typical. *See generally* J.A. 136-49. Both directly and through access to other sites, Critical Path provides an extensive online library concerning the transmission and treatment of AIDS.[12] The Critical Path Web site is accessed as often as 10,000 times per day by people all over the world. *Id.* at 138, ¶12. By definition, the information it provides deals with sexual activity, which is frequently described in colloquial terms that can be generally understood by its intended audience.

The importance of this information was summarized by Kiyoshi Kuromiya, who testified: "In my view, the information that Critical Path provides saves lives of both teenagers and adults and any attempt to censor or restrict the free flow of this life-saving information would be a critical public health mistake." Kuromiya Test. Decl. at 35, ¶13, ¶15, ¶16; *see also* M.A. 23a-36a, ¶¶176-188. Other plaintiffs also provide explicit information about safer sex. For example, the Safer Sex Web Page includes a photograph that illustrates the proper method of putting on a condom. *See* Pl.Exh. 50. They also host an online discussion group

[11] The government has consistently refused to say that plaintiffs' speech is not covered by the CDA, and has never challenged the standing of any of the plaintiffs. J.S. App. 12a n.9; *see also id.* at 107a (Dalzell, J.).

[12] Critical Path also sponsors online support groups, and provides low-cost Internet access to persons in the AIDS community. J.A. 136-38, ¶¶1-12.

that allows individuals to discuss issues, such as how to talk about safer sex with a partner. *See* M.A. 29a-31a, ¶¶203-214; *see also id.* at 18a-21a, ¶¶155, 161; 32a-33a, ¶¶221-28.

Plaintiff Stop Prisoner Rape (SPR), a nonprofit organization dedicated to combatting the rape of prisoners and providing assistance to survivors, has a Web site that contains a variety of documents about prisoner rape that use raw, street language to discuss violence, sex and certain excretory functions used to humiliate victims. The site publishes testimonial letters from survivors that describe their brutal victimization and the psychological as well as physical devastation they experienced; these letters educate the public by conveying the horrible realities of prisoner rape in ways that statistics could never do. SPR also provides a forum for survivors to talk openly about their anger and fears, receive important survival tips, and dispel uneducated myths about the subject. *See* Donaldson Test. Decl.; M.A. 17a-19a, ¶¶145-154.

Speech about gay and lesbian issues: Plaintiffs also include individuals and organizations who engage in speech of particular interest to gay men and lesbians. For example, Wildcat Press, a publisher of gay and lesbian literature, sponsors two electronic magazines (e-zines) on the World Wide Web that are written by and for gay and lesbian youth. Patricia Nell Warren testified that the YouthArts e-zines "provide a creative forum for many youth to discuss their coming out, their experiences with gay life and their sense of their own identity . . . . Many of the contributors openly discuss sex and sexuality, often using slang common to their age group." Warren Test. Decl. at 9, ¶¶21, 23; *see also* M.A. 26a-27a, ¶¶189-193. *See id.* at 22a-23a, ¶¶168-175. Plaintiff National Writers Union hosts an online mailing list called "NWU-queer" for writers who are gay, lesbian, or bi-sexual. *See id.* at 14, ¶131.

Speech about censorship and human rights: Several of the plaintiffs engage in speech concerning censorship. For example, the ACLU posts online information that includes the text of the famous "Seven Dirty Words" comic monologue that was declared "indecent" in *FCC v. Pacifica*, 438 U.S. 726 (1978). In addition, the ACLU hosts online discussions on a variety of civil liberties topics, ranging from efforts to censor Howard Stern's best-selling book, "Private Parts," to a discussion of masturbation as part of a larger debate over the firing of former Surgeon General Jocelyn Elders. *See* M.A. 3a-4a, ¶¶78-80.

Human Rights Watch, a nongovernmental organization that monitors and promotes the observance of international human rights, posts some of its reports on their Internet site. Those reports can include graphic language about prostitution, rape, and torture involving sexual mutilation. *See id.* at 5a-6a, ¶¶85-92. Plaintiffs EPIC, EFF, Justice on Campus and Cyberwire Dispatch use the World Wide Web and online discussion groups to communicate about censorship; among other things, they often provide excerpts of censored material. *See id.* at 6a-10a, ¶¶1893-106; 27a-29a, ¶¶194-202.

Controversial speech: Plaintiffs also include authors, publishers, and teachers who use the Internet to write or provide access to fiction and nonfiction that often uses strong language and addresses controversial issues. These plaintiffs include the Ethical Spectacle, an online newsletter that has discussed Nazi experimentation and the morality of pornography; BiblioBytes, an online bookseller with over one thousand titles including romance novels, erotica, classics, and horror; ClariNet and Cyberwire Dispatch, who publish news articles that sometimes uses vulgar and graphic language; and the Journalism Education Association, a national organization of high school teachers that assists minors with online research on many subjects, including

teenage sexuality, abortion, art and literature. *See id.* at 31a, ¶¶215-20; 15a-16a, ¶¶135-39; 21a-22a, ¶¶162-67; 28a-29a, ¶¶198-202; 10a-11a, ¶¶107-13.

Of course, the reach of the CDA extends far beyond the actual plaintiffs in this case. The government's own witnesses testified that the magazine *Vanity Fair*, with a nude cover photo of the actress Demi Moore, would be potentially indecent in some communities, J.A. 118-19, as would a political discussion that included the sentiment "Fuck the CDA," Olsen testimony, Tr. Vol. V, at 53-53. *See also* J.S. App. 99a (Buckwalter, J.); *id.* at 119a (Dalzell, J.). The trial court also found that artworks such as nudes by Edward Weston, material from contemporary films such as "Leaving Las Vegas," and reproductions of ancient Indian sculptures, are all within the CDA's broad proscriptions. *See id.* at 42a-47a, ¶¶74-75, 78, 85; 71a; 76a-77a.

C. The Nature Of The Internet

The Internet is a "unique and wholly new medium of worldwide human communication." *Id.* at 46a, ¶81. Simply described, it is a giant, global communications network that connects innumerable smaller computer networks. *Id.* at 12a, ¶1. While difficult to estimate due to rapid growth, the Internet is believed to connect over 9,400,000 host computers worldwide and as many as 40 million people. *Id.* at 13a, ¶3. Only about 60% of the Internet's host computers are currently located in the United States, and the percentage of foreign sites is growing. *Id.* The medium allows "literally tens of millions of people . . . to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." *Id.* at 13a-14a, ¶4. In the words of the trial court, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought."

Id. at 43a, ¶74. In addition to its vast online libraries, the Internet hosts conversations and even "'virtual communities' that simulate social interaction." *Id.*; *see also* Rheingold Test. Decl. at 2-3, ¶¶5-6 ("[V]irtual communities enable people to form associations that can enrich their lives and often carry over into face to face society").

As the trial court found, the evidence below "showed significant differences between Internet communications and communications received by radio or television." J.S. App. 49a, ¶89. Communications on the Internet do not "'invade' an individual's home or appear on one's computer screen unbidden." *Id.* at 49a ,¶88. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at ¶89. In addition, because the Internet is interactive, individuals can talk back, opposing speech they find disagreeable with more speech. The court also found that "[t]he start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication," permitting its use by individuals as well as large corporations. *Id.* at 44a, ¶76. The Internet is thus distinct because it is "not exclusively, or even primarily, a means of commercial communication." *Id.* at 43a, ¶75.

Search engines, which help computer users find information on the Internet, can on occasion "accidentally retrieve material of a sexual nature through an imprecise search." *Id.* at 49a, ¶88. However, the district court found many factors that decreased the likelihood of such an "accident":

> A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent Howard Schmidt, Director of the Air Force Office of Special Investigations, testified that the "*odds are slim*" that a user would come across a sexually explicit site by accident.

Id. (emphasis added).[13]

D. How Communication Takes Place On The Internet

There are a variety of ways in which users can communicate in cyberspace. *See generally id.* at 21a-25a, ¶¶22-32. Electronic mail (e-mail) allows an online user to address and transmit a message to one or more people, "comparable in principle to sending a first class letter." *Id.* at 21a, ¶23. In addition, there are a wide variety of online discussion forums that allow groups of users to discuss and debate subjects of interest. The three most common methods for online discussion are mail exploders, USENET newsgroups, and chat rooms.

Mail exploders, also called listservs, allow online users to subscribe to automated mailing lists that discuss particular subjects of interest. Subscribers send an e-mail message to the "list," and the mail exploder automatically and simultaneously sends the message to all of the other subscribers on

[13] While there was no dispute during the preliminary injunction proceedings that some sexually oriented material is available on the Internet, *id.* at 74a, ¶¶82-84, it is not "the primary type of content on this new medium." *Id.* at ¶83.

the list; subscribers can reply to the message by sending a response to the list. *Id.* at 22a, ¶24. Users of mailing lists can typically add or remove their names from the list automatically, with no direct human involvement. *Id.*

USENET newsgroups are huge databases of messages arranged according to subject matter, and online users may read or send a message to any newsgroup at any time without a prior "subscription." *Id.* at 22a-23a, ¶25. "USENET newsgroups . . . are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users." *Id.* There are newsgroups on more than 15,000 different subjects; "[c]ollectively, almost 100,000 new messages (or 'articles') are posted to newsgroups each day." *Id.* at 24a, ¶26.

In addition, chat rooms, or "Internet Relay Chats," allow "individuals on the Internet [to] . . . engage in an immediate dialog, in 'real time,' with other people on the Internet . . . . IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone." *Id.* at 24a, ¶27. There are thousands of different chat rooms available, "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." *Id.*

Finally, one of the most well-known methods for communicating information online is the "World Wide Web," which allows users to publish (or "post") documents, or "Web pages," that can then be accessed by any other user in the world. *See generally id.* at 25a-32a, ¶¶33-48. Most Web documents contain "links," which are "short sections of text or image which refer to another document." *Id.* at 27a, ¶36. When selected by the user, the "linked" document is automatically displayed, wherever in the world it is actually stored. *Id.* "These links from one computer to another, from one document to another across the Internet, are what

unify the Web into a single body of knowledge, and what makes the Web unique." *Id.* at 28a, ¶39. Ease of access, the court found, has been the key to the tremendous success of the Web. *Id.* at 32a, ¶8.

E. The Inadequacy Of The Statutory Defenses

Because the government essentially conceded that the CDA would be unconstitutional in the absence of the statutory defenses,[14] there was extensive evidence below on whether those defenses -- credit card verification, adult verification, or "good faith, reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors to [prohibited] communications" -- were actually available to speakers on the Internet. It concluded they were not.

Thus, the district court found that *none* of the defenses were available *at all* to online speakers who communicate, debate and exchange information by e-mail, mail exploders, USENET newsgroups, and chat rooms. J.S. App. 49a, ¶90 ("There is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms"); *see also Shea*, 930 F.Supp. at 941 ("[A]s the government concedes, for the vast majority of applications and services available on the Internet, a user has no way of communicating . . . with certainty that the content will not reach a person under eighteen").

Specifically, the district court found that "[t]here is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor." J.S. App. 50a, ¶90. "The difficulty of e-mail age verification is compounded for mail exploders . . . which automatically send information to

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[14] *See Shea*, 930 F.Supp. at 941.

all e-mail addresses on a sender's list." *Id.* The government's expert agreed that no current technology could "give a speaker assurance that only adults" were subscribed to the list. *Id.*

Similarly, the defenses do not work for USENET newsgroups. *Id.* at 50a, ¶91. Newsgroups are "disseminated using ad hoc, peer to peer connections between approximately 200,000 computers . . . around the world," *id.* at 23a, ¶25, and the "dissemination of messages . . . is an automated process that does not require direct human intervention or review," *id.* at 23a-24a, ¶25. Likewise, speakers who communicate in real time through chat rooms "cannot ensure that all readers are adults." *Id.* at 50a, ¶90. Moreover, it is not technologically possible for speakers in e-mail, mail exploders, newsgroups, or chat rooms to "segregate" their speech in a way that would prevent its availability to persons under 18. *Id.* at 50a, ¶92.

A different set of problems exists with the World Wide Web. As the district court found, the statutory defenses are not available *at all* for the large number of speakers who post content on the Web created through the commercial online services such as America Online (AOL), CompuServe and Prodigy. *Id.* at 51a, ¶96. The statutory defenses are meaningless to these Web sites because there is no way at present for them to determine the age of someone visiting the site. Other speakers on the Web can, in theory, use special technology to interrogate users through a fill-in-the-blank form. However, the mandatory use of this technology to request credit cards or age verification would pose an insurmountable economic burden for many Web sites.

First, credit card companies will not verify a credit card number unless the request is tied to a commercial transaction. Credit card verification is thus entirely unavailable to Web sites that do not charge for access, including many op-

erated by plaintiffs in this case. *Id.* at 53a, ¶98. Second, credit card companies charge for verification. Even if they were willing to provide credit card verification without an underlying transaction, the cost would be prohibitive for many Web sites. *Id.* at 53a-54a, ¶¶99-100.

The court was also unconvinced by the government's argument that content providers on the Web could request adult verification through other means. The court found that the government had offered only "very limited evidence regarding the operation of existing age verification systems, and the evidence offered was not based on personal knowledge." *Id.* at 55a, ¶103. The government's own witness admitted that "his knowledge of these services was derived primarily from reading the advertisements on their Web pages . . . and [he] could not testify to the reliability of their attempt at age verification." *Id.* at ¶103; *see also* J.A. 114-16 (Testimony of Howard Schmidt); *id.* at 120-25, 128-33 (Testimony of Dan Olsen). Further, there was evidence that existing adult verification systems, to the extent they are used at all, are used "for accessing commercial pornographic sites [which] charge users for their services." J.S. App. 55a; *see also* J.A. 130-32.

The trial court also considered whether speakers could take any other action that might constitute a "good faith, reasonable, and effective way" to keep "indecent" materials from minors; the court found that there were no such actions available to speakers. The government had suggested two options that do not now exist but that might be implemented in the future. First, the government suggested that all Internet speakers, or at least a subset of Web speakers, could work together to set up an age verification system. But, as the district court found, "the administrative burden of creating and maintaining a screening system and the ongoing costs involved is beyond the[] reach" of many noncommercial organizations, and prohibitive even for commercial enti-

ties. J.S. App. 55a, ¶105. Furthermore, "the government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18." *Id.* at 56a, ¶107.

Second, the government proposed a "tagging" system in which speakers would label their speech "indecent." *Id.* at 56a-58a, ¶¶108-116. This, too, was rejected by the district court, which found that tagging alone is totally ineffective, *id.* at 58a, ¶114 and can never be effective without the cooperation of "third parties to block the material on which the tags are embedded" -- parties who are not subject to criminal prosecution under the CDA. *Id.* at 79a. In addition, tags alone would still fail to resolve the technological impossibility of most speakers to send their tagged speech only to adults and not to minors. *Id.* at 58a, ¶116. Because the CDA is a criminal statute, the district court also dismissed as speculative the government's suggestion that a "consensus among speakers" might soon emerge "to use the same tag to label 'indecent' material," and that the industry might (at some future point) develop computer software "that recognizes the tags and takes appropriate action when it notes tagged speech." *Id.* at 57a-58a, ¶¶113-14.[15]

The trial court found that mandatory age verification also placed unwarranted noneconomic burdens on speech over the Internet. For example, the court found that "[v]erification of a credit card over the Internet is not now technically possible." *Id.* at 53a. Currently, the volunteer who runs the Critical Path AIDS Project does not have to be online at all while persons around the world instantaneously access the site thousands of times in a twenty-four hour period. To obtain advance credit card authorization before any user could access the site would require the volunteer to supervise the site around the clock and to delay access to each of the thousands of users until he could go off-line to verify the card. As the trial court found, that process "would significantly delay the retrieval of information on the Internet," *id.* at 54a, ¶101, thus damaging the ease of access that is one of the principal virtues of the medium. The government's expert agreed that even "a minute is [an] absolutely unreasonable [delay]." *Id.* In addition, the court found that some Web users would be discouraged from retrieving information if an adult ID or credit card were required. *Id.* at 55a-56a, ¶106. Finally, there was evidence that mandatory age verification would prohibit anonymous access to sensitive material on the Internet. J.A. 143, ¶23.

[15] Furthermore, the court found that, even if tagging were technologically possible, the task of determining which material to tag indecent "would be extremely burdensome for organizations that provide large amounts of material." *Id.* at 57a, ¶110. For example, "[t]he Carnegie Library would be required to hire numerous additional employees to review its online files at an extremely high cost to its limited budget." *Id.*

F. The Ineffectiveness Of The CDA And The Availability Of Less Restrictive Alternatives

It is undisputed that a "large percentage, perhaps 40% or more" of Internet content "originates outside of the United States," and that at least some of this content is sexually oriented. J.S. App. 59a, ¶117; *see also* Hoffman Testimony, Tr. Vol. II, at 68-69 (the number of foreign-based sites is growing and will soon reach 50%). It is also undisputed that "[f]oreign content is otherwise indistinguishable from domestic content . . . since foreign speech is created, named, and posted in the same manner as domestic speech." *Id.* Thus, despite the CDA, minors will continue to have access to all of the "indecent" material posted outside the United States as easily and as cheaply as domestic sites. Furthermore, "indecent" information that is now posted do-

mestically can be readily moved off-shore. *Id.* at 145a n.22 (Dalzell, J.).

Finally, the trial court issued extensive factual findings concerning the variety of voluntary measures available to restrict minors' access to online communications that their parents may consider unsuitable for them. *Id.* at 32a-42a, ¶¶49-73. Twenty-one paragraphs of these findings were based on stipulations by the parties, *see id.* at 32a n.12, which identified many different and currently available user-based features that enable parents to block certain online content, *id.* at 35a-41a.

First, the trial court reviewed user-based software products such as SurfWatch and Cyber Patrol, and found that "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* at 35a, ¶54. Unlike the CDA, these software programs *are* effective at controlling sexually oriented material originating from foreign sites. *See* J.A. 104-07, ¶41.

Second, the trial court considered parental control options offered by the large commercial online services such as AOL, Microsoft Network and Prodigy, free of charge to their members. J.S. App. 41a, ¶69. For example, AOL offers a "'Kids Only' parental control feature [that] allows parents to establish an AOL account for their children that accesses only the Kids Only channel on America Online." *Id.* at 41a-42a, ¶69. In addition, CompuServe and Prodigy give their subscribers the option of blocking access to bulletin boards and chat rooms within their networks. *Id.* at 42a, ¶71.

G. The Decision Below

Based on these extensive and largely undisputed findings, Chief Judge Sloviter concluded that "the CDA is not

narrowly tailored, and the government's attempt to defend it on that ground must fail." *Id.* at 81a. Judge Buckwalter stressed that "individuals attempting to comply with the statute . . . have no clear indication of what actions will ensure that they will be insulated from criminal sanctions under the CDA." *Id.* at 100a. And Judge Dalzell described the Internet as "the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen." *Id.* at 141a. Because the CDA "would necessarily reduce the speech available for adults on the medium," Judge Dalzell added, it is "constitutionally intolerable." *Id.* at 144a. All three judges agreed that the CDA should be preliminarily enjoined.

SUMMARY OF ARGUMENT

This Court has consistently held that the government may not criminalize constitutionally protected speech for adults in the guise of protecting children. Yet, that is precisely what the CDA does. As the lower court found, the vast majority of Internet users can only comply with the CDA by self-censoring their speech to a level deemed acceptable for minors. If speakers choose not to, or guess wrong, they face a substantial prison sentence.

The government correctly conceded in the lower courts that the CDA must be subject to strict scrutiny because it is content-based. The government's efforts in this Court to disavow the strict scrutiny test are unpersuasive. In particular, criminal regulation of the Internet cannot be analogized to administrative regulation of broadcast, especially since none of the rationales that support regulation of broadcast apply to the Internet. To the contrary, "[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails," as Judge Dalzell observed below. J.S. App. 144a. As Judge Dalzell further observed, "a Newspa-

per Decency Act passed because Congress discovered that young girls had read a front page article in The New York Times on female genital mutilation in Africa, would be [clearly] unconstitutional." *Id.*

The CDA clearly fails strict scrutiny because it is not narrowly tailored. The trial court correctly found as a matter of fact that the statutory defenses were completely unavailable to the vast majority of speakers, and economically prohibitive for other speakers. In addition, the CDA is ineffective at achieving the government's goal because it will not prevent minors from accessing the "indecent" material posted outside the United States. The CDA is also significantly more restrictive than readily available user-based blocking software and other alternatives that enable parents to decide what their children will read and see.

The CDA is also both overbroad and vague. The record in this case establishes that a vast range of valuable speech has been placed in jeopardy by the CDA. In addition, the government has been unable to define with clarity what the statute means and what it covers. Indeed, the sponsors of the CDA endorse for the first time in an *amicus* brief an interpretation of the statute different than the one they proposed in Congress and different than the one asserted by the government throughout this litigation. Plaintiffs are left to speak at their own peril; prosecutors are unconstrained by any meaningful guidelines.

Finally, the government's eleventh-hour effort to salvage two sections of the CDA by narrowing their focus should be rejected. The argument is based on interpretations of the statute that were not proffered below, that are inconsistent with the plain meaning of the statute when taken as a whole, that contribute to the CDA's vagueness, and that fail to cure its fatal overbreadth.

ARGUMENT

I. THE CDA REPRESENTS A UNIQUE CENSORSHIP SCHEME THAT DEMANDS STRICT JUDICIAL SCRUTINY

A. The CDA Is Unconstitutional As A Flat Ban On Protected Speech

The decision below rests on the critical finding that the vast majority of Internet speakers cannot distinguish between minors and adults in their audience. As a result, they cannot comply with the CDA unless they speak only in language suitable for children. The CDA therefore operates as a criminal ban on constitutionally protected speech among adults.

Just last Term, this Court cited the long-standing First Amendment rule that prevents the government from "reduc[ing] the adult population . . . to . . . only what is fit for children." *Denver Area Educational Television Consortium v. FCC*, 518 U.S. __, 116 S.Ct. 2374, 2393 (1996)(citations omitted)(*Denver Area*). Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech because to do so would "burn up the house to roast the pig." *See Butler v. Michigan*, 352 U.S. 380, 383 (1957)(invalidating a conviction for distribution of indecent publications). Similarly, in *Sable Communications v. FCC*, the Court struck down a total ban on indecency in phone communications because it had the "effect of limiting the content of adult [communications] to that which is suitable for children." 492 U.S. 115, 131 (1989). Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," this Court has *never* upheld a *criminal* ban on indecent speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)(striking down a ban on mail advertisements for contraceptives). Applying this

well-established law to the trial court's findings yields the inescapable conclusion that the CDA is flatly unconstitutional.

B. The CDA Must Be Subject to Strict Scrutiny

If the CDA is not *per se* unconstitutional as a flat ban under *Butler*, it is certainly subject to strict scrutiny as a content-based restriction on speech. Indeed, the government conceded as much throughout this litigation until its last brief.[16] Perhaps abandoning that view, the government now makes reference to five different standards, refusing to choose among them. The government's new position is both confused and wrong.

"Indecency" (unlike obscenity) is constitutionally protected speech that often *has* substantial social value and *lacks* prurient interest. *Sable*, 492 U.S. at 126. Subject only to "narrow and well-understood exceptions, [the First Amendment] does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broadcasting System v. FCC*, 512 U.S. __, __, 114 S.Ct. 2445, 2458-59 (1994)(citing *R.A.V. v. St. Paul*, 505 U.S. __, __, 112 S.Ct. 2538, 2547 (1992)); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The "indecency" and "patently offensive" provisions of the CDA are unquestionably content-based bans on protected speech, and thus are presumptively unconstitutional. Content-based regulations of speech will be upheld only when they are justified by

[16] The trial court noted that "[t]he government's position on the applicable standard has been less than pellucid but . . . it now appears to have conceded that it has the burden of proof to show both a compelling interest and that the statute regulates least restrictively." J.S. App. 67a. *See also Shea*, 930 F.Supp. at 939 ("At oral argument, the Government's counsel conceded that strict scrutiny analysis is appropriate . . . .").

"compelling" governmental interests and "narrowly tailored" to effectuate those interests. *See Turner Broadcasting*, 114 S.Ct. at 2455; *Simon & Schuster, Inc. v. New York State Crimes Victims Bd.*, 502 U.S. 105 (1992); *Sable*, 492 U.S. 126 (1989); *Bolger*, 463 U.S. 60 (1983). This Court has applied strict scrutiny to content-based regulations because "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting*, 114 S.Ct. at 2458.

The application of strict scrutiny to the CDA is also fully consistent with this Court's recent decision in *Denver Area*, 116 S.Ct. 2374. Five members of the Court agreed that strict scrutiny was the appropriate test for any cable regulation that burdened speakers' rights.[17] Because it is a criminal statute and not a regulatory scheme, the CDA imposes a more onerous burden on speech than the burden invalidated in *Denver Area*. The scope of the CDA is also more expansive. Its "indecency" ban potentially affects the speech of millions of Americans who use the Internet and who do not have the benefit of legal advice attempting to discern the limits of permissible expression.

The *Denver Area* plurality found it "unnecessary and unwise" to settle on a single standard to resolve the case, noting the dynamic and rapid changes taking place in telecommunications technology. *Id.* at 2385. But the facts in this case establish that the CDA would effectively *destroy* the innovation and growth that the Court in *Denver Area* cautiously sought to protect and that have been essential to

[17] *See id.* at 2407, 2419 (Kennedy and Ginsberg, JJ., concurring in part and dissenting in part); *id.* at 2424, 2429 (Thomas, J., Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part).

development of the Internet.[18] In Judge Dalzell's words, "The CDA will, without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet." J.S. App. 133a. In short, the high First Amendment stakes in this case demand strict judicial review.

C. The Government's Reasons For Rejecting Strict Scrutiny Are Unpersuasive

Citing *FCC v. Pacifica*, 438 U.S. 726, the government argues that its power to regulate "indecent" speech on the Internet should be as broad as its power to regulate "indecent" radio broadcasts. *Pacifica*, however, is easily distinguishable. First, it did not involve a total ban on "indecent" speech. Second, the district court in this case specifically found that the chances of accidentally encountering "indecent" speech on the Internet are slight. Third, there is nothing in the record to support the government's claim that sexual content on the Internet is "uniquely accessible to children." Fourth, the government improperly recharacterizes *Pacifica* as a case about "pervasiveness" rather than "invasiveness." If the government could justify a content-based regulation whenever a communications medium became "pervasive" in American homes, bans on "indecency" in books, on the telephone, or even in normal conversation would be constitutional. That is plainly not the law.[19]

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[18] "[I]f the medium is reconstituted to accommodate the Act, it will cease to possess those unique characteristics which are responsible for its growth and adoption as a communications medium by individuals the world over and which represent its potential as a revolution in democratic communication." Hoffman Test. Decl. at ¶139.

[19] In addition, the primary justification for intermediate scrutiny in the broadcast cases was spectrum scarcity. By contrast, the Internet has vir- (continued...)

The government's effort to justify a lower level of scrutiny based on *Ginsberg v. New York*, 390 U.S. 629 (1968), is also misguided. The statute in *Ginsberg* only prohibited materials found to be "obscene as to minors," *id.* at 637, a category that is much narrower than indecency. Likewise, *Ginsberg* only prohibited the direct commercial sale of magazines to minors, and did not ban any communications between adults. Indeed, the Court in *Ginsberg* specifically noted that the statute was "not invalid under our decision in *Butler*" because it "does not bar the appellant from stocking the magazines and selling them" to adults. 390 U.S. at 634-35. Finally, the statute in *Ginsberg* "[did] not bar parents who so desire from purchasing the magazines for their children," *id.* at 639. Under the CDA, by contrast, even parents may not utilize the Internet to transmit material that may be regarded as "indecent" to their children.

This Court's cases allowing cities to use zoning regulations to prevent "secondary effects" caused by adult bookstores and theaters also fail to support a lower level of scrutiny in this case. *See, e.g., Renton v. Playtime Theaters*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 75 (1976)(Powell, J., concurring). Unlike the CDA, zoning regulations impose only civil rather than criminal penalties for violation, and apply only to commercial businesses. In addition, zoning regulations do not (and constitutionally cannot) constitute a total ban. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Even zoning regulations are justified only if the targeted businesses have "negative secondary effects" in their surrounding communi-

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[19] (...continued)
tually limitless communications potential. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Turner Broadcasting*, 114 S.Ct. at 2456-57; *Sable*, 492 U.S. at 127-28, *Bolger*, 462 U.S. at 74 (1983).

ties. *See, e.g., Renton v. Playtime Theaters*, 475 U.S. 41; *Young v. American Mini Theaters, Inc.*, 427 U.S. at 75. Contrary to the government's argument, the impact of speech is not a "secondary" effect. *See Boos v. Barry*, 485 U.S. 312 (1988)(regulation subject to strict scrutiny if it "focus[es] only on the content of the speech and the direct impact that speech has on its listeners"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-36 (1992); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15 (1975); *Schneider v. New Jersey*, 308 U.S. 147, 162-63 (1939).

The government also suggests that the CDA is a regulation of "secondary effects" because the "government's interest in ensuring that parents are not deterred from allowing their children to use the Internet is directly analogous to the concerns about crime, reduced property value, and the quality of urban life that animated the cities in *Renton* and *Young*." Gov't Brief at 32. This newly coined interest was never articulated by Congress or the government below and there is absolutely no evidence in the record to support it. *See* Section II.B.3, *infra*. Even the much less draconian zoning regulations at issue in *Renton* and *Young* require that the government establish a record that the adult businesses *actually cause* secondary effects such as higher crime rates, injury to retail trade, and depression of property values.[20] *See Renton*, 475 U.S. at 48.

[20] Even if the government had presented actual evidence -- which it did not -- that some parents were deterred from using the Internet because of the presence of sexual material, this would certainly not justify a content-based, criminal ban on protected speech. If it did, controversial material currently available in libraries and bookstores could be banned simply because parents were fearful of its effects on their children -- which would amount to a permanent "fearful parents" veto on protected speech.

II. THE CDA FAILS STRICT SCRUTINY

Applying strict scrutiny, the trial court assumed that the government had a compelling interest in preventing at least younger minors from accessing some indecent materials. *But see* p.41, *infra*. Nevertheless, the trial court found that the CDA failed strict scrutiny in two separate and independent respects. First, because the CDA's defenses are completely unavailable for the vast majority of speakers, the trial court held that the CDA amounts to a criminal ban on constitutionally protected speech among adults. Almost by definition, such a result is not "narrowly tailored" to the government's purpose. Second, the trial court found that the CDA is a grossly ineffective method of achieving the government's interest and that substantially more effective and less restrictive methods exist.

A. The CDA Is Not Narrowly Tailored Because Its Defenses Are Unavailable For The Vast Majority Of Speakers On The Internet

1. The CDA Operates As A Flat Ban For All Speakers Using Newsgroups, Mail Exploders, Chat Rooms, And Commercial Online Services, And For All Noncommercial Speakers On The World Wide Web

The trial court found that "*no technology exists* which allows those posting on the category of newsgroups, mail exploder or chat rooms to screen for age. Speakers using those forms of communication cannot control who receives the communication." J.S. App. 74a (emphasis added)(Sloviter, J.); *id.* at 136a (The defenses are "unavailable to participants in specific forms of Internet communication")(Dalzell, J.). In addition, the trial court found that there was no technology available that would enable age verification by con-

tent providers on AOL, CompuServe and Prodigy. *Id.* at 51a, ¶96. Thus, the CDA would require the millions of people communicating by e-mail and mail exploders, all the people who send the 100,000 daily messages to USENET newsgroups, all the people carrying on conversations in chat rooms, and all the speakers who provide content through the large commercial online services, to reduce their speech to a level suitable for minors. *See* pp.13-14, *supra*. As to this universe of speakers, who even by themselves represent the overwhelming majority of speakers on the Internet, the CDA clearly fails strict scrutiny as a flat ban on indecency in violation of *Butler* and *Sable*.

The trial court also found that credit card verification is completely unavailable for the vast number of speakers on the Web who do not charge -- and do not wish to charge -- a fee for their information. Their finding was based on plaintiffs' unrebutted evidence that credit card companies will not verify cards in the absence of a commercial transaction. Steinhardt Test. Decl. ¶26; Anker Test. Decl. ¶21; Croneberger Test. Decl. ¶27; J.A. 122-23.

To require noncommercial speakers to begin to charge for their speech in order to verify age would violate the mission of many of the plaintiffs to provide free information. As Kiyoshi Kuromiya testified, "[c]ost should not be a barrier between . . . users and life-saving AIDS prevention and treatment information." J.A. 143-44. The cost would also put most of the plaintiffs out of business. As the trial court noted, "[i]f Critical Path must pay a fee every time a user initially enters its site . . . it would incur a monthly cost far beyond its modest resources." J.S. App. 54a, ¶100. Patricia Nell Warren testified that credit card screening on the YouthArts Web site would cost $9,000 for two days. Because YouthArts is produced entirely by volunteer labor,

and has no funding sources, the cost would be devastating.[21] Warren Test. Decl. ¶¶29-38. Barry Steinhardt testified that the ACLU would be forced to shut down its site if required to implement credit card screening. Steinhardt Test. Decl. ¶29-30; Steinhardt Testimony, Tr. Vol. III, at 173:7-21, 184:608, 185:7-17. All of these providers thus would have to steer clear of communicating potentially indecent speech even to adults.

2. The Burdens Of Age Verification For Content Providers On The World Wide Web Would Drive Many Speakers From The Marketplace

Based on uncontroverted evidence in the record, the trial court also found that the CDA would pose an unconstitutional burden on the narrow slice of speakers on the Internet for whom the defenses are not completely unavailable. Economic burdens on the exercise of protected speech are routinely struck down by the courts. Thus, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, this Court found an unconstitutional deterrent effect on free speech where, to avoid prosecution, theater owners were required either to "restrict their movie offerings or [to] construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.* at 217. In *Simon & Schuster v. New York State Crime Victims Bd.*, this Court stated that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," because such a regula-

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[21] Ms. Warren testified that electronic magazines for young people have proliferated precisely because the cost of production is much lower, and the distribution much simpler, than for print media. Warren Test. Decl. ¶36; Warren Testimony, Tr. Vol. I, at 189:1-16.

tion "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 115 & n.36.

The government acknowledges, at least, that "costs and burdens are not irrelevant" to the constitutionality of the CDA, Gov't Brief at 39, but it fails to apply strict scrutiny to analyze those burdens. Where a content-based regulation imposes criminal sanctions on protected speech, the question is not whether the burden "leaves open significant opportunities for adult-to-adult communication," *id.* at 39, but whether the law uses the *least restrictive means* to accomplish a compelling government interest. Moreover, after its grudging admission that economic burden is relevant, the government then attempts to minimize that burden by ignoring the factual findings. But the trial court clearly found that the burden of age verification would literally require many speakers to cease engaging in constitutionally protected speech, regardless of the age of the reader.

For example, the government argues that speakers who post indecent material on their Web sites "for commercial purposes can take advantage of the statutory defenses." *Id.* at 34. But the government fails to distinguish between commercial entities who actually sell information or products over the Internet and businesses who disseminate free information about their services or products. The Internet has allowed many small businesses to prosper precisely because they can provide information about their services for little or no money. The low entry barriers would be destroyed, thus silencing many speakers and reducing the breadth of diversity and information on the Internet, if these speakers were forced to charge for all of their speech. J.S. App. 131a-137a (Dalzell, J.).

In addition, far from the "modest burden" that the government suggests, Gov't Brief at 35, the trial court specifically found that the high cost of credit card verification would impose an unconstitutional burden on many commercial speakers. J.S. App. 53a-54a, ¶¶97-102. Thus, based on unrebutted evidence, the trial court found that "as a practical matter, noncommercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods . . . proposed by the government, and that even if they could attempt to age verify, there is little assurance that they could successfully filter out minors." *Id.* at 74a (Sloviter, J.); *id.* at 136a ("defenses either are not available to plaintiffs here or would impose excessive costs on them") (Dalzell, J.).

The government's argument that speakers on the Web can use adult verification services established by third parties also ignores the actual trial record. *See* p.15, *supra.* The government offered only hearsay evidence about third-party verification systems on the Web. One government witness testified that he "had no idea whether any of these adult verification systems would be feasible for nonprofit organizations that run largely or totally on volunteer labor." J.A. 116. The other testified that he had simply read the Web pages for these services, but did not know how third party verification systems actually obtained age verification. *Id.* at 122-23 ("How that referral technology works, I can't say right now"). Based on this record, the trial court concluded that the government failed to prove that third-party verification services provide an effective or practicable way for speakers on the Web to screen for age. J.S. App. 55-56a, ¶103-07.

Even if the record supported third-party verification as an economically viable option on the Web, the government ignores the substantial additional noneconomic burdens of such verification. This Court affirmed as recently as last Term that it is unconstitutional to require adults to "register"

in order to gain access to constitutionally protected speech. In *Denver Area*, the Court struck down the statutory requirement that viewers provide written notice to cable operators if they want access to certain sexually oriented programs because the requirement "restrict[s] viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." 116 S.Ct. at 2391. To require noncommercial speakers on the Web, under threat of criminal sanctions, to force their users to register with an unknown and possibly unreliable third party verification service is at least as onerous a burden on First Amendment rights as the scheme this Court found unconstitutional in *Denver Area*. *See also Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965)(finding unconstitutional a requirement that recipients of Communist literature notify the Post Office that they wish to receive it). A registration requirement would also prevent Americans from exercising their First Amendment right to engage in communication anonymously on the Internet. *See* J.S. App. 61a, ¶121; *McIntyre v. Ohio Elections Commission*, 514 U.S. __, __, 115 S.Ct. 1511, 1524 (1995).

3. The Government May Not Require Speakers To Switch To Another Form Of Communication

Implicitly acknowledging the factual weakness of its argument that speakers in mail exploders, newsgroups and chat rooms can avoid prosecution through the CDA's defenses, the government contends that these speakers can avoid criminal difficulties by shifting their conversation "to a Web site that is screened for age."[22] Gov't Brief at 37.

[22] There is no evidence in the record to support the government's sug- (continued...)

This argument illustrates a fundamental misunderstanding of the nature of these forums, which (unlike the World Wide Web) are characterized by spontaneous interactions, much like casual conversation. The government's suggestion is analogous to requiring a speaker chatting on a street corner, before saying a vulgar word or discussing sexual subjects, to stop mid-sentence, leave the corner, write down her thoughts, and have them published and sold at a bookstore that screens out minors. Even if a speaker chose to go through this tortured process rather than simply to remain silent, she would likely find it impossible to comply because, as discussed above, the vast majority of content providers on the Web also lack any method of screening for age.

More importantly, requiring speakers to switch to an alternative method of communicating is patently unconstitutional. In any event, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. New Jersey*, 308 U.S. at 163).

4. Future Technology Cannot Save A Statute That Criminalizes Speech Today

Not surprisingly, the government has all but abandoned its argument that future technological developments, such as speaker-end tagging and screening, may provide a means for speakers to comply with the Act. *See* Gov't Brief at 38; *see* p.16, *supra*. As Judge Sloviter wrote, "I can imagine few arguments less likely to persuade a court to uphold a crimi-

[22] (...continued)
gestion that "chat rooms, newsgroups, and mailing lists can be established on a Web site." Gov't Brief at 37.

nal statute than one that depends on future technology." J.S. App. 82a (Sloviter, J.). The government's argument that tagging could constitute a "good faith defense" failed below because "there is no such technology" that allows speakers to tag their speech in a way that would ensure that minors were prevented from accessing it. *Id.* at 79a (Sloviter, J.). Conversely, industry continues to invent new ways to empower parents -- from the user end -- to control Internet content, illustrating that less restrictive alternatives to the CDA's draconian burdens are clearly available.

B. The CDA Fails Strict Scrutiny Because It Does Not Directly And Materially Advance The Government's Asserted Interest In Protecting Minors

1. The CDA Is Ineffective

The government fails to acknowledge another independent set of facts that were crucial to the trial court's conclusion that the CDA is not narrowly tailored. These facts show that even if the majority of speakers on the Internet could utilize the CDA's defenses -- and the factual record clearly establishes that they cannot -- the CDA would still fail to achieve the government's stated purpose of protecting minors. Because of the global nature of the online medium, even the CDA's total ban will be ineffective at ridding online networks of "indecent" material. Based on undisputed facts in the record, *see* pp.17-18, *supra*, the trial court concluded:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

J.S. App. 145a (Dalzell, J.).

Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. PSC*, 447 U.S. 557, 564 (1980). The government bears the burden of showing that its scheme will "in fact alleviate . . . the alleged harms in a direct and material way." *Turner Broadcasting*, 114 S.Ct. at 2470. As Justice Scalia wrote in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring)(holding that Florida law prohibiting disclosure of rape victims' names in "any instrument of mass communication" but not by other means did not directly and substantially further the law's stated purpose).[23] Because the CDA is a strikingly ineffective tool for achieving the government's interest, it fails strict scrutiny.

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[23] *See also Denver Area*, 116 S.Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring")(Kennedy & Ginsburg, JJ., concurring in part and dissenting in part); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979)(invalidating law making it a crime for newspapers, but not electronic media, to publish the names of juvenile offenders); *Bolger*, 463 U.S. at 73 (restriction that "provides only the most limited incremental support for the interest asserted" cannot survive scrutiny under commercial speech standards).

2. Other, More Effective Means Exist To Empower Parents And Users

The government also defends the CDA's criminal ban on adult speech on the grounds that there are no "equally effective" alternatives. First, that argument misstates the relevant legal test. It is always true that only an "absolute ban" on adult speech "can offer certain protection against assault by a determined child." *Denver Area*, 116 S.Ct. at 2393. But the Court has repeatedly rejected the notion that the First Amendment rights of adults can be sacrificed to achieve that certainty, especially when less restrictive alternatives exist. *Id.* (and cases cited therein).

Second, the government's argument ignores the strong factual record regarding the numerous alternatives available to parents, which came from the government's own stipulations at trial. Focusing only on user-end software programs, the government suggests that the trial court did not find them to be "currently effective." Gov't Brief at 41. To the contrary, the trial court found that the existing software affords parents a significant option for protecting children. J.S. App. 146a (Dalzell, J.).

In addition, the government itself agreed that "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* at 35a; *see also id.* at 35a-41a. Unlike the CDA, these software programs *are* effective at controlling sexually oriented material originating from foreign sites. *See* p.18, *supra*. The government's brief also completely ignores the additional protections available through the major commercial online services -- AOL, Microsoft Network, CompuServe and Prodigy -- all of which "offer parental control options free of charge to their members." *Id.* at 41a-42a; *see* p.18, *supra*. Additionally, it ignores its own stipulations regarding the Platform for Internet Content Selection

(PICS), a coalition of major online service providers and computer companies that are developing standards to facilitate user-based blocking. *Id.* at 32a-35a.[24]

The government is always free to further its interests by educating the public about the "benefits and dangers of this new medium." *Id.* at 146a (Dalzell, J.). As this Court noted in *Denver Area*, "informational requirements" and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to patently offensive material. 116 S.Ct. at 2393. *See also* Title V, Subtitle C, Pub.L.No. 104-104, §552(1), 110 Stat. 142 (encouraging the establishment of a "technology fund" to support the development of user-based blocking technology and public education).

3. The CDA Is Not Narrowly Tailored To Address The Government's Newly Asserted Interest In Promoting Use Of The Internet

Without any support in the record, the government on appeal coins a separate, independent interest in the CDA --

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[24] Some *amici* suggest that teenagers are more adept with computers than adults, Brief of *Amici* Morality in Media at 23; Brief of *Amici* Enough is Enough at 20, although no evidence on this issue was presented to the trial court. This suggestion, even if true, would only be relevant if parents could not turn on blocking software or if minors could disable it. But the record showed that parental control options are no more difficult to enable than a bank ATM card, and are just as difficult to disable. Duvall Test. Decl. at 6-8, ¶¶13-16. As this Court has said, "[n]o provision . . . short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify 'reduc[ing] the adult population . . . to . . . only what is fit for children.'" *Denver Area*, 116 S.Ct. at 2393 (citations omitted).

it suggests that "[u]nless steps are taken to restrict the availability of such material to children, parents . . . may be deterred from bringing the Internet into their homes at all." Gov't Brief at 30. The government introduced no evidence at trial to support this assertion, and the trial court was not asked to make any findings on this point. Under strict scrutiny, this Court should consider only those interests identified by the government below and considered by the trial court. *See Holly Farms Corp. v. NLRB*, 517 U.S. __, 116 S.Ct. 1396, 1402 n.7 (1996).

Even if consideration of this newly asserted interest were proper, it is contradicted by the record. Far from showing that parents have been deterred from using the Internet, the facts establish that the Internet is expanding at an exponential rate, and that the number of users -- including minors -- continues to grow. J.S. App. 13a, ¶3. Further, there is no legal support for the government's proposition that its interest is "compelling," or that the CDA would be a narrowly tailored means of achieving the interest. Indeed, "indecent" materials are widely available in public libraries, and yet, it is doubtful that the government would attempt to justify a flat ban on indecency in libraries under the rationale that parents would otherwise refuse to allow their children into them. As discussed above, user-based screening technologies and public education are a far more narrowly tailored means of addressing any parental concern over sexually oriented content on the Internet than a criminal ban which prohibits adults from gaining access to constitutionally protected speech.

III. THE CDA IS SUBSTANTIALLY OVERBROAD AND CANNOT BE NARROWLY CONSTRUED

The government continues to suggest that the CDA must be upheld because, in theory, it could be applied to some speakers without violating the Constitution. Gov't Brief at 34. But, as the trial court held, a law must be struck down as facially invalid "if it would 'penalize a substantial amount of speech that is constitutionally protected' . . . . even if some applications would be 'constitutionally unobjectionable.'" J.S. App 106a (Dalzell, J.)(citing *Forsyth County v. Nationalist Movement*, 505 U.S. at 129). *See also Shea*, 930 F.Supp. at 950 (holding that the CDA is substantially overbroad because "the set of content providers whose speech could be constitutionally proscribed is in fact exceeded, perhaps even overshadowed, by the number of users whose speech is constitutionally protected").

The doctrine of substantial overbreadth arose to permit facial challenges to laws that might have some permissible applications but that threaten a substantial quantity of constitutionally protected speech. *E.g., Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). This is particularly the case where, as with the CDA, the law regulating speech is criminal in nature. *See, e.g., Houston v. Hill*, 482 U.S. 451, 459 (1987).

As discussed above, the facts firmly establish that the CDA operates unconstitutionally for the overwhelming majority of online speakers -- speakers who communicate through mail exploders, newsgroups, chat rooms, and on the Web, and who either *have no available technology* for screening minors from their audience or who could not shoulder the economic and other unconstitutional burdens of compliance. *See* Section II.A, *supra*. To cure this obvious overbreadth, the government suggests that the trial court should have upheld §223(d)'s display provision at least to

the extent that it applies to commercial Web sites. Gov't Brief at 34. But even that application suppresses a substantial amount of protected speech. All the commercial speakers who provide content through AOL, CompuServe, and Prodigy, and all the commercial speakers who use the Web for communications other than the actual sale of services or products, lack the ability to verify the age of their users. J.S. App. 51a, ¶96.

Even if the CDA could be applied constitutionally to commercial Web sites, which it cannot, such a narrowing construction would contradict the CDA's clear legislative purpose. The trial court in this case and in *Shea* correctly declined to perform such "radical surgery." 930 F.Supp. at 923. As Judge Sloviter wrote: "It is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." J.S. App. 75a; *see also* H.R. Conf.Rep. No. 458, 104th Cong., 2d Sess. 113, 191 (1996)(Conf.Rep). Among other things, Congress intentionally banned material under the CDA that *lacks* prurient appeal and that *has* serious value. In addition, given the explicit application of the statute to libraries and educational institutions, *see* §§230(e)(2) and 223(f)(a), the government's suggestion would require more than creative redrafting. The *Shea* court similarly declined the invitation "to usurp Congress' legislative functions" with an interpretation that "fl[ies] in the face of a clear congressional intent to apply the statute's proscriptions to commercial and non-commercial content providers alike." 930 F.Supp. at 949-50.

In a final effort to persuade the Court to ignore the well-established rules of overbreadth and uphold the CDA as applied to commercial Web sites, the government cites the CDA's severability clause. *See* Gov't Brief at 45-48. If Congress could avoid the precision the Constitution requires when First Amendment rights are at stake simply by including a severability clause, it could always "set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875). This Court has rejected that approach for more than a century.

The government also fails completely to address the serious overbreadth problems posed by the CDA's broad ban of material that is constitutionally protected for minors. "Indecency" embraces a much broader category of speech than the "harmful to minors" standard articulated in *Ginsberg*. Plaintiffs presented substantial evidence that the CDA's "indecency" standard will bar a vast quantity of material on the Internet that is *valuable* to minors, especially older adolescents. J.S. App. 71a (Sloviter, J.). *See also* J.A. 140 ¶¶16-17; 142-43 ¶22.

According to a March, 1996 report of the President's Office of National AIDS policy, one quarter of all new HIV infections in the U.S. are estimated to occur in young people between the ages of 13 and 20. J.A. 142, ¶22. *See also* U.S. Dep't of Commerce, Bureau of the Census, *School Enrollment -- Social and Economic Characters of Students: October 1992*, table 1 (Oct. 1993)(123,000 people under age 18 are enrolled in college, 117,000 of them as freshmen); Alan Guttmacher Institute, *Sex and America's Teenagers* 19 (1994)(In 1994, more than half of teenage females and almost three quarters of teenage males had been sexually active before their 18th birthday). In the face of these realities about today's youth, the government is hard-pressed to demonstrate that it has a compelling justification for barring older minors from access to explicit safer sex information or other communications that may help them deal with the onset of sexuality.

IV. The CDA Is Unconstitutionally Vague

Although plaintiffs recognize that some members of this Court have upheld the "indecency" standard against vagueness challenges in other contexts, *see Denver Area*, at least three distinguishing factors support Judge Sloviter's and Judge Buckwalter's conclusion that, when applied to the global Internet, "indecency" is hopelessly vague.

First, and crucially, "the CDA attempts to regulate protected speech through criminal sanctions, thus implicating not only the First but also the Fifth Amendment of our Constitution." J.S. App. 88a (Buckwalter, J.). As this Court has stated, criminal statutes should be scrutinized with extreme care for clarity because "'[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,'" and this is particularly true of laws "'having a potentially inhibiting effect on speech . . . .'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976)(quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), and *Smith v. California*, 361 U.S. 147, 151 (1959)).

The CDA puts millions of ordinary citizens -- not media giants with staff counsel -- at risk of criminal prosecution merely for communicating in possibly "offensive" terms online. Online communications through newsgroups, chat rooms, and mail exploders are often as fleeting as conversations on a street corner. And yet the CDA requires all of these speakers to determine, before they speak, whether their statements are "patently offensive." Given the uncertainty of that judgment, there is no doubt that many of these online speakers will choose to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

Second, the government's own inability to define consistently the speech rendered criminal by the CDA dramatically illustrates just how freewheeling the subjective, discretionary judgments of police and prosecutors under the CDA would be.[25] At trial, Special Agent Schmidt, a federal law enforcement officer, opined that an extremely explicit safer sex illustration of how to put a condom on an erect penis would not be subject to prosecution because its "context" was educational, not "purely for pleasure purposes." Schmidt Testimony, Tr. Vol. IV, at 137:5-138:19. By contrast, the much less explicit photo of pregnant actress Demi Moore on the cover of *Vanity Fair* magazine would be illegal if published on the Internet, according to this experienced federal law enforcement officer, because the "context" was not primarily educational, but was "fun, basically . . . for fun more than anything else." J.A. 119. Dr. Dan Olsen, the government's computer expert, testified that any of the "seven dirty words" made famous by the *Pacifica* decision, or their synonyms, would be covered. *Id.* at 127-28. Yet, the government and some *amici* continue to insist that the CDA encompasses only commercial pornography, a term without legal significance. *See* Gov't Brief at 34-35; Brief

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[25] The defenses, far from resolving the CDA's vagueness, fail to provide speakers with any clear guidelines about how to avoid prosecution. *See Shea*, 930 F.Supp. at 943-44, in which John C. Keeney, Acting Assistant Attorney General of the Criminal Division of the Department of Justice, advised in a letter to the court that tagging would be "substantial evidence" in support of a "good faith" defense. As Judge Dalzell noted, "[i]t is . . . an unanswered question whether the Keeney letter would eliminate any of the CDA's chill, since the Government acknowledged that the letter would not prohibit a United States Attorney from taking a contrary position in a particular prosecution." J.S. App. 133a-134a, n.20.

for *Amici* Enough is Enough at 7.[26]

Amici and the government also offer inconsistent opinions about the meaning of the CDA's terms. For example, the conference report stated that the CDA is intended to have "the same meaning as established in *FCC v. Pacifica* and *Sable Communications of California*." Conf.Rep. at 188 (citations omitted). But some of these same members of Congress now assert as *amici* that "[o]nline indecency was not intended and should not be held to have the same scope as broadcast indecency," and that the two standards "differ markedly." Brief of *Amici* Senators Dan Coats, James Exon, *et al.*, at 7 (Cong. Brief). The executive branch has not clarified the legislative branch's confusion, and the Court is left to decide if prior indecency cases are even relevant.

Amici and the government also offer inconsistent opinions about whether indecency excludes material of value and whether value is to be measured for adults or minors. In an interpretive about-face, the congressional *amici* now suggest that "indecency considers serious value for adults as well as minors," *id.* at 13, and "does not reach serious expression that should be protected for adults."[27] *Id.* at 2. But the

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[26] The government did not seriously contest the standing of the plaintiffs in this case. *See* n.11, *supra*. Even more dramatically, the government did not contest standing in *Shea*, which involved a single magazine article using strong language as part of a political attack on the CDA itself. 930 F.Supp. at 923.

[27] *Amici*'s suggestion that "indecency" excludes material with serious value is also contradicted by the case law. For example, the satiric comic monologue at issue in *Pacifica* could hardly be said to lack *any* artistic or political value. *Pacifica*, 438 U.S. at 751; *see also id.* at 741 n.16 (scenes from LADY CHATTERLEY'S LOVER, though constitutionally protected, would raise serious "indecency" concerns if broadcast); *United* (continued...)

conferees *explicitly rejected* a "serious value for minors" exemption when they voted *against* the "harmful-to-minors" standard.[28] *See* Conf.Rep. at 189; *see also* 142 Cong. Rec. H1166 (daily ed. Feb. 1, 1996)(statement of Rep. Berman).[29]

Finally, the CDA is unconstitutionally vague because it fails to define the relevant "community" that will set the standard for what is "indecent" on the global Internet. *See* J.S. App. 96a-98a (Buckwalter, J.). While the Conference Report states that the CDA is meant "to establish a uniform national standard of content regulation," Conf.Rep. at 191, the government below suggested that local community standards would apply. *See* J.S. App. 96a-97a (Buckwalter, J.); J.A. 119. Even if one assumes that local standards apply, speakers have no way of determining which local com-

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[27] (...continued)
States v. Evergreen Media Corp., 832 F.Supp. 1183 (N.D.Ill. 1993) (broadcast talk shows containing sexual innuendo); *KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd. 3689 (1990)(news story about a highly publicized alleged rape).

[28] The government's and *amici*'s reliance on the phrase "in context" exacerbates rather than resolves the vagueness of the CDA. *See* Gov't Brief at 43-44; Cong. Brief at 14. A speaker on the World Wide Web has no control over the "context" in which his speech is viewed; the material is simultaneously presented in potentially thousands of different "contexts" through the *ad hoc* linking feature of the Web. *See* J.S. App. 117a n.11 (Dalzell, J.).

[29] In response to the government's argument that it would not prosecute "works of serious literary or artistic merit," Judge Sloviter wrote: "[It] would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's ULYSSES as obscene . . . . The bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors." J.S. App. 82a-83a.

munity provides the relevant standard. The facts at trial showed that online communications are accessible virtually anywhere regardless of their "community" of origin, and online speakers have no way to determine the geographic origin of the persons who access their speech. J.S. App. 47a-48a, ¶¶85-86. In order to protect themselves from prosecution, then, all Internet speakers would have to conform to the standards of the least tolerant community in the United States -- a result that this Court explicitly rejected in *Miller v. California*, 413 U.S. 15, 33 (1973)("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity").

V. ALL THREE CHALLENGED PROVISIONS ARE UNCONSTITUTIONAL

In an effort to hide the unconstitutionality of all of the CDA's provisions, the government creates a smokescreen by attempting to distinguish §223(a)(1)(B) and §223(d)(1)(A) from §223(d)(1)(B). Gov't. Brief at 24-27. For several reasons, this smokescreen should not divert the Court. Most significantly, the government did not present the argument below. *See Holly Farms Corp. v. NLRB*, 116 S.Ct. at 1402 n.7 (declining to entertain argument that petitioners had failed to advance previously, because the Court "generally do[es] not address arguments that were not the basis for the decision below")(quoting *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. __, 116 S.Ct. 873 n.5 (1996)).

The government's effort to draw distinctions between the challenged provisions of the CDA also lacks support under a fair reading of the statute. Congress clearly applied the "safe harbor" defenses of §223(e)(5) to all three provisions of the CDA.[30] If §223(a)(1)(B) and §223(d)(1)(A) were meant to apply only to persons who intentionally communicated indecent or patently offensive material to a particular person they knew to be a minor, it would be nonsensical for such speakers to be able to assert §223(e)(5)(A)'s "good faith" defense, or §223(e)(5)(B)'s "verified credit card" defense, to avoid prosecution. Thus, the government's interpretation is unpersuasive.

Finally, the government's attempt to define the non-display provisions narrowly has been unclear and inconsistent. In its Jurisdictional Statement, the government suggested for the first time that §223(a)(1)(B) "applies only in situations in which a person transmits indecent material to another person, knowing that person is under 18." Jurisdictional Statement at 20. In their response, the ALA Plaintiffs interpreted the government's new definition to mean that the provisions applied "only when the *only* recipient of a communication is known to be a minor." ALA Response at 25. But the government then flatly contradicted that understanding, stating:

> [W]e do not interpret Sections 223(a)(1)(B) and 223 (d)(1)(A) as reaching only those situations in which the sender knows that the *only* persons receiving an indecent message are minors. *Those Sections also apply when a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor.*

Opposition to Motion to Affirm, at 4 n.1 (second emphasis added). Under this interpretation, the non-display provisions

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[30] Section 223(e)(5) provides "a defense to a prosecution *under subsection (a)(1)(B) or (d)*" (emphasis added).

clearly violate *Butler* because, as discussed above, adults communicating by mail exploders, newsgroups and chat rooms have no way to prevent their messages from being distributed to the minors in these forums while continuing to communicate with the adults.

The government's brief on the merits is more ambiguous than its brief in opposition about when the provisions would apply. Now, the government says that the provisions "appl[y] only in situations in which a person transmits indecent material to another person, knowing that person is under 18." Gov't Brief at 24. By way of supposed clarification, the government then offers an example to support the argument that the non-display provisions do not affect adult-to-adult communications: "[I]f an adult learned that one of the participants in a chat room was under 18, and then sent a private indecent communication to that individual by e-mail, the transmission provision would be violated." *Id.* Their example fails to note that the non-display provisions, under their previous interpretation, would force all of the adults in the chat room to censor themselves until they knew with certainty that the minor had left. The government's example also leaves totally unclear the status of newsgroups and mail exploders. For example, if a speaker in the Safer Sex Forum read a posting by someone who identified herself as a minor, does that speaker have to refrain from "indecent" speech when she posts her next message to the Forum? The government's ambiguous interpretation leaves this, like many of the real world applications of the CDA, unclear and unconstitutionally vague.

CONCLUSION

For the reasons stated above, the judgment of the three-judge district court preliminarily enjoining enforcement of the CDA should be affirmed.

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